

**United States Department of Labor
Employees' Compensation Appeals Board**

D.R., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
NORTH TEXAS HEALTH CARE SYSTEM,
Dallas, TX, Employer**

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**Docket No. 14-1688
Issued: April 8, 2015**

Appearances:

*Michael E. Woods, for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 4, 2014 appellant, through her representative, filed a timely appeal of an April 22, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss compensation under 5 U.S.C. § 8106(c)(2) for refusal of suitable work.

FACTUAL HISTORY

This case has previously been before the Board. Briefly, on October 19, 1998 appellant, then a 56-year-old nursing assistant, filed a traumatic injury claim alleging that, while pulling a

¹ 5 U.S.C. § 8101 *et seq.*

patient without assistance, she suffered an injury to her right neck down to her right shoulder. OWCP accepted her claim for right shoulder sprain, cervical strain, and cervical herniated discs at C3-4, C4-5, C5-6, C6-7, and C7-T1. It paid compensation benefits but, in a May 25, 2000 decision, terminated appellant's compensation effective June 18, 2000 on the grounds that she refused an offer of a position as a laundry worker which OWCP found suitable on April 18, 2000. OWCP denied modification of the termination decision on May 23, September 25, and October 31, 2001. Appellant retired on November 18, 2001. By decision dated June 22, 2011, OWCP denied her request for reconsideration as it was not timely filed and did not establish clear evidence of error. However, in a decision dated July 15, 2013, the Board reversed as it determined that appellant had established clear evidence of error as OWCP had not properly served the decision terminating her benefits on her representative and, that therefore, the decision terminating her compensation was null and void. The facts as set forth in the Board's prior decision are hereby incorporated by reference.²

On July 24, 2013 appellant filed a claim for wage-loss compensation for the period May 29, 2000 through July 5, 2013. OWCP advised her of her burden of proof to establish disability on July 25, 2013. By letter to OWCP dated July 30, 2013 appellant, through her representative, stated that it was incumbent upon OWCP to implement a new return to work job offer as prescribed in FECA Procedure Manual. Appellant's representative also requested an election letter so that appellant could exercise her choice of either FECA payments or Office of Personnel Management retirement for the entire period.

By letter dated August 15, 2013, appellant's representative enclosed claims for compensation and requested back pay. By letter dated October 18, 2013, he noted that appellant attempted to return to work as a laundry worker on September 20, 1999 but was unsuccessful. Appellant's representative discussed appellant's work with the employing establishment from August 16, 1999 through January 2, 2000, and noted that she was placed on OWCP compensation rolls on February 1, 2000 with an effective date of January 3, 2000. He contended that OWCP had not met its burden to justify termination or modification of appellant's compensation.

In a decision dated November 8, 2013, OWCP terminated appellant's compensation effective November 18, 2001, the date of her retirement, on the grounds that she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2). It determined that the weight of the medical evidence established that she could work as a laundry worker at that time, noting it had determined the suitability of this position on April 18, 2000. OWCP added that retirement was not a valid reason for refusing the offer.

On November 14, 2013 appellant, through her representative, requested a hearing before an OWCP hearing representative. He argued, in subsequent letters and at the February 20, 2014 hearing, that OWCP simply reissued the same decision the Board reversed, stating that appellant had refused a valid job offer by retiring on November 18, 2001 and that this letter cannot be reissued without giving her due process notice. Appellant's representative contended that she must be provided an opportunity to accept or deny a suitable job offer in order for OWCP to meet its burden of modifying or terminating compensation. He argued that OWCP could not

² D.R., Docket No. 12-1228 (issued July 15, 2013).

issue a retroactive bar to compensation, that the November 8, 2013 letter failed to provide a pretermination notice, that OWCP failed to provide appellant with a new job offer so she did not know where or when to report, and that OWCP could not simply say that she utilized a job offer from 10 years prior. Appellant's representative also contended that it should have afforded her the opportunity to elect either workers' compensation or retirement benefits by forwarding to her a Form CA-1102. He concluded that, since the termination of benefits was vacated, the burden was again on OWCP to terminate benefits, and it may not terminate compensation without establishing that the disability ceased or is longer related to employment.

In a decision dated April 22, 2014, the hearing representative affirmed the November 8, 2013 decision. She noted that the issue was whether appellant "refused a valid offer at the time of the May 25, 2000 decision."

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.³ OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴ The fact that OWCP accepts a claim for a specified period of disability does not shift the burden of proof to the claimant to show that he or she is still disabled. The burden is on OWCP to demonstrate an absence of employment-related disability is the period subsequent to the date when compensation is terminated or modified.⁵ Pursuant to FECA Procedure Manual, before terminating benefits, the claims examiner is responsible for advising the claimant of the proposed termination or reduction, including the reasons for the proposed action and provide claimant an opportunity to respond in writing.⁶ The Board has held that OWCP must follow its procedures and provide notice and opportunity to respond prior to the termination of compensation benefits.⁷

Section 8106(c) of FECA provides in pertinent part, "a partially disabled employee who (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."⁸ It is OWCP's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.⁹ The Board has long held that section

³ *Mohamed Yunis*, 42 ECAB 325, 334 (1991); *see also J.P.*, Docket No. 13-1049 (issued August 16, 2013).

⁴ *Gewin C. Hawkins*, 52 ECAB 242 (2001).

⁵ *J.S.*, Docket No. 13-1678 (issued April 3, 2014).

⁶ FECA Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.2(b) (February 2013).

⁷ *K.S.*, Docket No. 11-2021 (issued August 21, 2012).

⁸ 5 U.S.C. § 8106(c).

⁹ *Joyce M. Doll*, 53 ECAB 790 (2002).

8106(c) will be narrowly construed as it serious a penalty provision that may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.¹⁰

Under section 8116 of FECA,¹¹ an injured employee must make an election between compensation for disability and retirement pay.¹² OWCP procedures provide that, when an election is required in a disability case, OWCP must provide a Form CA-1102 to the employee.¹³ This form provides information about the rate of compensation payable and the employee's right to elect the more advantageous benefit.¹⁴

ANALYSIS

In a decision dated July 15, 2013, the Board reversed OWCP's termination decision as it determined that OWCP had not properly served the decision terminating appellant's benefits on her representative, and that therefore the May 25, 2000 decision terminating her compensation was null and void.¹⁵ On remand, in its November 8, 2013 decision, OWCP terminated appellant's compensation retroactive to November 18, 2001. This was based on a job offer made to her on April 18, 2000, over 13 years prior to the issuance of the November 8, 2013 decision. This decision was affirmed by the hearing representative on April 22, 2014. The hearing representative noted that the issue was whether appellant "refused a valid offer at the time of the May 25, 2000 decision." However, as the Board vacated the termination of benefits, the burden was again on OWCP to terminate benefits and it may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment. The burden of proof on OWCP included the necessity of furnishing rational medical opinion evidence and a predetermination notice was required.¹⁶

After the Board determined that the prior termination decision was null and void, OWCP needed to reissue all appropriate pretermination letters and provide appellant an opportunity to respond to the proposed termination. Due process and elementary fairness require that a claimant under the circumstances presented have notice and an opportunity to respond to termination of benefits.¹⁷ To properly terminate compensation under 5 U.S.C. § 8106(c), OWCP must provide appellant notice of its finding that an offered position is suitable and give her an

¹⁰ *G.M.*, Docket No. 11-1752 (issued April 24, 2012); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

¹¹ 5 U.S.C. § 8116.

¹² *Id.* at § 8106; *see also M.W.*, Docket No. 09-2130 (issued July 15, 2010); *R.H.*, Docket No. 08-2025 (issued July 20, 2009).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.5(b) (February 1995).

¹⁴ *Id.*

¹⁵ *Supra* note 2.

¹⁶ *See M.W.*, *supra* note 12; *Lan Thi Do*, 46 ECAB 366 (1994).

¹⁷ *Supra* note 7.

opportunity to accept or provide reasons for declining the position.¹⁸ Once OWCP found the job suitable, it should have advised her of its finding and afforded her 30 days to either accept the job or present any reasons to counter OWCP's finding of suitability.¹⁹ If appellant presented such reasons and OWCP determined that those reasons are unacceptable, OWCP should provide appellant 15 days in which to accept the offered work without penalty.²⁰ Only after providing 30-day and 15-day notices, may OWCP terminate her entitlement to further compensation.²¹ OWCP may not simply rehabilitate the pretermination letter it issued 13 years earlier on April 18, 2000. It may not terminate appellant's compensation for refusing suitable work without providing her, in the usual manner, the proper notice and the opportunity to be heard.²² The Board notes that as a penalty provision section 8106(c)(2) must be narrowly construed.²³ The Board finds that the termination was improper and it will be reversed.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's wage-loss compensation under 5 U.S.C. § 8106(c) for refusal of suitable work.

¹⁸ See *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992); see also *M.R.*, Docket No. 11-1566 (issued February 8, 2012).

¹⁹ 20 C.F.R. § 10.516.

²⁰ *Id.*

²¹ *Id.* at § 10.517(b). This includes compensation for lost wages as well as compensation for any permanent loss of use of a scheduled member. *Id.*; see 5 U.S.C. §§ 8105, 8106, and 8107.

²² *M.L.*, 57 ECAB 746 (2006).

²³ See *Karen M. Nolan*, 57 ECAB 489 (2006); *Stephen A. Pasquale*, 57 ECAB 396 (2006).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 22, 2014 is reversed.

Issued: April 8, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board